

**Rainbow Shops, Inc. and United Food and Commercial Workers Union Local 1550, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 13-CA-28141**

May 24, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On June 29, 1990, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel, the Respondent, and the Union each filed exceptions and supporting briefs; the Respondent filed an answering brief to the General Counsel's and the Union's exceptions, and the General Counsel filed a brief in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Rainbow Shops, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent and the Union have excepted to some of the judge's credibility findings. The General Counsel also put credibility in issue by relying on testimony the judge did not credit. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>We agree with the judge that the Respondent violated Sec. 8(a)(3) both by discouraging former Associated employees Qualls, Sims, Walker, Sullivan, and Marilyn Campbell from applying for work, and by unlawfully refusing to hire or consider for employment other former Associated employees who applied for part-time work. In adopting the judge on the applicant issue, we find that the General Counsel established a prima facie case of unlawful discrimination which the Respondent failed successfully to rebut. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, the applicants had been represented by the Union during their previous employment, a fact well known by the Respondent, and they applied for rank-and-file positions which the Respondent was actively engaged in filling. Furthermore, the Respondent demonstrated considerable animus against the Union as shown by the repeated unlawful statements of its managers Baughn, Carrillo, Ringo, and Gardner that union-represented Associated employees would not be hired. In these circumstances, and given the Respondent's failure to establish that the applicants would have been denied employment for reasons unrelated to their union membership, we agree that the Respondent violated Sec. 8(a)(3).

<sup>3</sup>The complaint alleged that the Respondent violated Sec. 8(a)(5) by refusing to recognize and bargain with the Union as the exclusive representative of Rainbow employees, and by unilaterally changing employees' terms and conditions of employment. After exceptions were filed with the Board, the

Union moved to withdraw its 8(a)(5) charges. The Board granted the Union's unopposed motion on May 1, 1991, and dismissed the 8(a)(5) complaint allegations. Accordingly, the 8(a)(5) issues are not before us.

*Richard S. Andrews, Esq. and Ann Crane, Esq.*, for the General Counsel.

*Adin Goldberg, Esq. (Spengler & Carlson)*, of New York, New York, and *Jonathan D. Karmel, Esq. (Rosenfeld & Karmel)*, for the Respondent.

*Jairus M. Gilden, Esq. and Jerry Gesiakowski*, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on June 12-16 and July 6, 1989, at Chicago, Illinois. The charge was filed on November 7, 1989, by United Food and Commercial Workers Union Local 1550, Chartered by the United Food and Commercial Workers International Union AFL-CIO, CLC (the Union). The complaint issued December 30, 1988, and was amended March 30 and May 26, 1989. The complaint, as amended, alleges that Rainbow Shops, Inc. (Rainbow or Respondent), violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the complaint, as amended, alleges that Respondent violated Section 8(a)(1) of the Act by telling applicants for employment that it was not hiring union members. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discouraging the filing of job applications, failing to consider for employment and failing and refusing to employ any of the approximately 77 individuals who were employees of the predecessor employer and who were represented by the Union for collective-bargaining purposes with the predecessor employer where the reasons for Respondent's actions were based on the fact that said employees were members of or supported the Union and were represented by the Union. Finally, the complaint alleges that Respondent violated Section 8(a)(1) and (5) by failing and refusing to recognize the Union as the exclusive collective-bargaining representative of its employees and by using certain unilateral changes in the working conditions of said employees. In its answer, Respondent denies the commission of any unfair labor practices.

All parties appeared at the hearing and were afforded full opportunity to be heard and present evidence and argument. All parties filed briefs. On the entire record, including my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT<sup>1</sup>

I. CHRONOLOGY

Associated Retail Stores, for many years, owned and operated stores in the city of Chicago selling Women's and children's clothing. These stores did business under the names of York, Goodwin and Just Kids. The rank-and-file employees, the cashiers, salesclerks, and stock personnel of some 42

<sup>1</sup>By means of Respondent's answer and stipulations entered into at the hearing, Respondent admits that the Board has jurisdiction and that the Union is a labor organization within the meaning of the Act.

of these stores had been represented for purposes of collective bargaining by the Union for at least 19 years as of 1988.<sup>2</sup> The most recent contract covering these employees was scheduled to expire on December 31 of that year, following the execution of a 1-year extension.

In 1987 Associated suffered some financial setbacks and late in that year began to lay off certain of its employees preparatory to the closing of some of its stores. The following March, Associated advised the Union that it was closing a number of stores because they were no longer profitable. The Union requested a list of stores which Associated intended to close.

In April, Associated complied with the Union's request and supplied it with a list of stores that it intended to close. By this time, five to seven stores had already closed. Stores in addition to those on Associate's list also were closing. Finally, the Union was advised that Associated intended to close all of its stores. As each store prepared for closing, Associated cut the hours of certain employees and terminated others. Managers and assistant managers performed the duties of laid off rank-and-file employees. Merchandise from closed establishments was consolidated for sale at locations still operating.

Throughout May Associated continued to close stores, advising the Union as it did so. Finally, on May 31 Associated informed the Union that it was filing for bankruptcy.

In June, Associated continued to close stores. One morning in June, Associated called a meeting which was held in the basement office of its State Street store. This meeting was attended by Associated's district managers. The object of the meeting was to tell those present that was happening in light of the fact that the Company was going out of business. Those present were advised that Associated could remain in business for about a month and that during that time most of the district managers present would each be reassigned to a particular store while it still remained open.

On June 29, Respondent Rainbow entered into an assignment and assumption agreement whereby it acquired the leasehold interest in a large number of stores previously operated by Associated's parent company, Joe Norban, Inc., including 13 stores in the Chicago area, operated or previously operated by Associated. The June 29 agreement was approved by the United States Bankruptcy Court, Southern District of New York on July 18, and on July 28 the leasehold interest was actually transferred to Rainbow. By separate agreement, however, the purchaser permitted the seller to remain in possession of some stores, including the one located at 240 S. State Street in Chicago, until August 6 so as to enable it to liquidate its merchandise. To succeed in doing so Associated continued to employ some sales personnel until August 6 when finally the State Street store closed, its last one in the Chicago area.

In the first week of July, Kevin L. Cohen, Respondent's director of operations and real estate, accompanied by two other officials, visited and inspected the 13 Associated stores in Chicago which it had purchased. Of the 13 stores, 8 were still operating and were in the process of liquidating. The Rainbow officials were chauffeured from store to store by Carl Wyant, previously a member of Associated's management, but then employed by the liquidating firm.

Following his trip to Chicago, Cohen began to make arrangements to open the 13 newly acquired stores as Rainbow shops. He requested that Wyant supply a list of managers who were then or who had previously been employed by Associated whom he could recommend for employment with Rainbow. He also made arrangements to have certain members of Rainbow management, located elsewhere, come to Chicago to assist in the opening of the stores.

In compliance with Cohen's request, Wyant compiled the list of prospective Rainbow management employees. He then had Cora Clay, a Rainbow secretary, call each of the people on the list and advise them to attend a meeting scheduled for the evening of July 26 at the State Street store in Chicago. Meanwhile, Cohen had contacted John Leutheuser, a Regional Manager for Rainbow based in Miami, and instructed him to attend the July 26 meeting, address the assembled Associated managers and assistant managers, and offer them jobs with Rainbow.

Leutheuser arrived in Chicago the last week in July. On July 26 he met with Richard Bogan, Rainbow's director of security and, accompanied by Harold Schy, a district manager for Associated, they visited the 13 stores, only two of which were still open and operating under Associated. The closed stores were empty of all merchandise.

On the evening of July 26 the meeting took place, as scheduled, in the basement of the State Street store, about 6:30 or 7 p.m., after it closed. All of Associated's rank-and-file sales employees had gone home. In attendance were between 16 and 18 of the Associated managers and assistant managers who had been recommended by Wyant. This was the first meeting called by Rainbow management and attended by Associated's managers and assistant managers.

Leutheuser conducted the meeting on behalf of Rainbow. Bogan spoke briefly about security and left early. Leutheuser then explained to those in attendance the benefits of working for the Respondent and invited them to apply for employment. He distributed applications to those present. A few filled out applications at the meeting and returned them to him immediately. Most of those who eventually obtained employment with Rainbow, however, sent in their applications late the following week.

Of those managers and assistant managers who attended the July 26 meeting, a few never went to work for Rainbow. On the other hand, not all of the employees hired to be managers or assistant managers at the 13 newly acquired stores had previous experience with Associated.

On Sunday July 31, two members of Rainbow's management arrived in Chicago, at Cohen's direction, to initiate the process of opening the 13 stores recently acquired from Associated. Judy Fink from Tavarack, Florida, and Mike Brower from Respondent's southern operations had been requested by Cohen to report to Chicago for a period of 2 to 4 weeks to set up the new locations, train personnel, and get the stores open and running.

To obtain rank-and-file employee applicants, Rainbow placed an advertisement in one or more Chicago newspapers containing the telephone number of the State Street store. Then, on August 1, Fink and Brower first arrived at the State Street store, which was still open and being operated by Associated, they placed a sign in the window indicating that applications for employment with Rainbow were being accepted within, at the lower level.

<sup>2</sup> Hereafter all dates are in 1988 unless otherwise noted.

Fink began to take applications on August 1 and continued to do so through August 2. She set up tables on one side of the store on the lower level there she stationed herself to hand out blank applications and receive the completed ones. She conducted brief interviews with the applicants and explained Rainbow's wage rates and hours to each of them. On August 2 or 3 Frank Calendar, another Rainbow management employee, arrived in Chicago and thereafter shared with Fink, the responsibility for hiring new sales/cashier employees for Rainbow.

On August 1 and 2, between 75 and 130 people applied at the State Street store for sales/cashier jobs with Rainbow. Subsequently, help wanted signs were placed in the windows of each of the other 12 stores. Then, 3 or 4 days before each of these stores was scheduled to prepare for opening, a store manager was sent to that store with a table and chair and some application forms. The store manager would then supply a blank application form to interested potential employees who completed the form and returned it to her. The completed forms were then mailed to the State Street store. Thereafter, applicants were called to the State Street store where they were interviewed by Calendar. Some of these were chosen by Calendar to help open the store at which they had applied and sent back to be put to work by the store manager preparing the store for opening. The store manager would then choose from those working at her store the ones she deemed to be the best workers and hire them to be the permanent sales/cashiers at that store. This system of hiring continued at each of the remaining stores until all 13 were fully complemented and open for business.

Jerry Gesiakowski, the Union's director of organizing, was the individual who had represented Associated's unit employees prior to its closing. Sometime in August, long after he learned on May 31 that Associated was filing for bankruptcy, Gesiakowski also heard that some of the stores had opened as Rainbow shops. Gesiakowski visited several of the stores to determine if any of the employees previously employed by Associated had been hired by Respondent. He did not, however, make any attempt, at this time, to contact Respondent's management to seek recognition or apprise it of the existence of the Union's contract with Associated.

Finally, on October 17, Gesiakowski visited the State Street store and handed a letter to Frank Calendar demanding recognition of the Union as representative of the employees in the 13 stores which Respondent had taken over from Associated. At the same time a copy of the letter was sent by certified mail to Respondent's corporate office in Brooklyn, New York. Although several business agents from the Union had visited various stores prior to October 17, none of them had contacted any member of Respondent's management. The Union at no time provided Respondent with a copy of the contract which it had with Associated nor did it furnish to Respondent the names, addresses or other information concerning its member employees of Associated.

Except for Associated employees at the State Street store and one other store, for a day or two, virtually all of the unit employees had left the employ of Associated long before representatives of Respondent came to Chicago to reopen the stores as Rainbow shops, and had dispersed without any contact being made with Respondent's management. Exceptions to this general rule are discussed below.

## II. ALLEGED 8(A)(1) AND (3) VIOLATIONS, INCIDENTS, AND OTHER EVIDENCE OF ANTIUNION ANIMUS

As noted above, in June Carl Wyant called a meeting which was held in the office in the basement of the State Street store. The purpose of the meeting was to advise members of management what was going to happen to them during the period of liquidation. Among those present were the district managers including Dora Baughn Wyant, at this meeting, advised each of those present at which stores they would be working during the final month of Associated's existence, as each store closed. He also advised those present that the district managers would act as store managers and assistant store managers and that the rank-and-file sales personnel, i.e., union employees would not be retained. At least, that is what happened following the meeting.

Dora Baughn, still a district manager at the time of this meeting, testified credibly that at the time of the meeting, she knew nothing about Rainbow Shops or its eventual take over of Associated's stores. According to Baughn, at the June meeting there was no one from Rainbow in attendance; there was no one from New York in attendance; there was no discussion of Rainbow Shops, Inc. taking over Associated stores; there was no discussion of Rainbow Shops, Inc.; there was no discussion of any takeover of Associated's stores; and there was no discussion of whether or not a takeover company would hire union employees.<sup>3</sup>

About the first of July,<sup>4</sup> another meeting was held. This was again attended by district managers who were scheduled to become store managers, the State Street store manager and assistant managers. Present also were three men from Consolidated, the New York company which was in charge of liquidating Associated's remaining assets. The liquidators addressed the district managers, soon to be store managers, and advised them about selling off the merchandise and about how many payroll hours could be used to do so. As at the June meeting, Rainbow Shops, Inc. was not mentioned nor was there any discussion about any company taking over the Associated stores or whether it would hire union employees.

Ida Lachtara, a witness for the General Counsel, testified that a meeting was held in the office of the State Street store which I believe to be the one described immediately above.<sup>5</sup> Lachtara, a rank-and-file employee of Associated and a member of the Union for 14 years testified, in agreement with the above, that the meeting was attended by all of the managers, i.e., district managers, "and the new men that took over the store." Lachtara testified that there were three men from New York but could not otherwise identify them.<sup>6</sup>

After the meeting, the participants came out of the office and dispersed. Edna Downs, the State Street store's assistant store manager for Associated, had not attended the meeting<sup>7</sup> but had been working just outside the office where the meeting was held. Alpert, the store manager, had attended the

<sup>3</sup> Testimony of General Counsel's witnesses to the contrary is not credited.

<sup>4</sup> The date was credibly supplied by Dora Baughn.

<sup>5</sup> Lachtara testified that this meeting occurred the third week of July. However, the date was supplied by General Counsel in a leading question and I do not believe it to be correct. Rather, it was more likely the one held the first of July.

<sup>6</sup> General Counsel concluded that the three men from New York were Rainbow representatives. However, I find, as Dora Baughn testified, that they were the liquidators.

<sup>7</sup> Dora Baughn testified that Downs attended this meeting. I credit Downs' denial.

meeting and told Downs what it was about. According to Lachtara, Downs came up to her after the meeting and said, "I'm sorry, but you can no longer work for York because they are not taking any union people." Since Downs, at the time, was still an employee of Associated and had probably just been told that the district managers would be retained for the month of July for the purpose of closing down the remaining stores and that the rank-and-file (union) employees were being terminated, I conclude that this is what she was telling Lachtara. Since this conversation, at any rate, had nothing to do with Rainbow because Rainbow was not yet on the scene, and since Associated is not a respondent in this case, I find that the incident is neither a violation nor evidence of animus.<sup>8</sup>

Lachtara testified concerning a second meeting which occurred about a week after the one described immediately above. The time then, would be about the second week in July. According to Lachtara, those who attended were again the district managers and "the three people who took over the store." Present also were Alpert, manager of the State Street store and Edna Downs, his assistant.

Following this meeting, according to Lachtara, Downs approached her and said, "This is it. No more job, no more union employees. You can't even try to get a job." Alpert also spoke to her and told her that he was sorry; that "they are not taking any union [rank-and-file] employees." When she asked if she could fill out an application, he replied in the negative, adding that he "didn't even know if he would have a job." He said that definitely "no union employees could fill out applications." Finally, according to Lachtara, Dora Baughn talked with her. Baughn broke down and cried. She indicated to Lachtara that she was losing her job and stated, "I am sorry you are losing your job too because no union employees can apply."

I find that these conversations all occurred before Rainbow arrived on the scene; that they had nothing to do with Respondent; but rather with the termination of rank-and-file employees of Associated, and their replacement by district managers for the purpose of closing down the remaining stores. These conversations are neither violative of the Act nor evidence of animus on the part of Respondent.

General Counsel called Ora Surney, a rank-and-file union employee, to testify to an event that occurred the last week in July. By that time it was known that Rainbow was doing to take over certain Associated stores. According to Surney, as she was running up the stairs from the basement to the first floor, she saw Alpert and Wyant standing at the top of the stairwell. She heard Alpert tell Wyant that Rainbow is a nonunion company, that they do not want union workers there. Surney did not hear any reply nor any more conversation. Since Alpert was not an employee of Rainbow at the time and there is nothing in the record to indicate that his hearsay statement was anything more than an opinion, I will not rely upon it as evidence to support the General Counsel's case.<sup>9</sup>

<sup>8</sup> Where Lachtara's testimony is contrary to these findings, it is not credited.

<sup>9</sup> Neither Alpert nor Wyant testified. The inability or unwillingness of any party to call these key witnesses has seriously undermined the role of the fact finder to draw a complete picture of the takeover of Associated's stores by Rainbow and its effect on Associated's union employees.

Following the meetings with the district managers, Alpert called two meetings with all personnel including rank-and-file (union) personnel to inform them of the decisions made and already communicated to the district managers. One meeting was held in early July, the second in mid-July.<sup>10</sup> Both meetings were held at the State Street store.

Alpert addressed the assembled employees at both meetings. He informed them that the remaining Associated stores would all be closing but that he did not know the exact dates. He explained that he would continue as manager of the State Street store until it closed but that personnel at the other stores during the few remaining weeks would be replaced by district managers (nonunion personnel) and all rank-and-file (union) personnel would be terminated. The district managers would become store managers and assistant managers and would be in charge of liquidating merchandise and closing the stores. He added that rank-and-file employees at the State Street store would be permitted to continue working if they chose, until it closed. Alpert wished all the employees well and offered to provide references for those employees seeking employment elsewhere.

Some employees, threatened with displacement, apparently argued that the layoff procedure should follow seniority and that rank-and-file employees with greater seniority should be permitted to apply<sup>11</sup> for the work still available at the other stores. Alpert replied that he was sorry but none of the rank-and-file (union) employees could apply for the remaining jobs because the jobs were being filled by nonunion personnel, i.e., the district managers. He added that he did not want to hear anything about seniority anymore; that "they" (Associated) would recognize seniority for purposes of vacation<sup>12</sup> pay, but that was it. He concluded by stating that there was "no more union in the company."

One employee, Emily \_\_\_\_\_,<sup>13</sup> began to argue but Downs cut her off, reiterating Alpert's statements and adding, "None of you girls can apply for a job because it is going to be a nonunion shop. There is no union in the store anymore."

Two witnesses, Downs, a management employee and Evelyn Sullivan, a rank-and-file union employee, testified credibly that Rainbow was never mentioned at either of the two July meetings where Alpert and Downs addressed the rank-and-file. I find this to be the case.<sup>14</sup>

As noted above, Judy Fink interviewed between 75 and 130 applicants for jobs with Rainbow on August 1 and 2. Associated employee Evelyn Sullivan requested and obtained an application from Fink, filled it out and returned it to her.

<sup>10</sup> The record is muddled as to specific dates. An attempt has been made herein, to place the various meetings in proper chronological order based on the subject content of the meetings and the probabilities of the sequence of events.

<sup>11</sup> Counsel for the General Counsel, in brief, p. 5, assumes that the application being discussed at this meeting concerned applications for jobs with Rainbow, citing Tr. 312-313. The cited transcript pages, however, do not mention Rainbow. Moreover, two witnesses testified that there was no mention of Rainbow at either of these meetings.

<sup>12</sup> The context of the discussion about seniority clearly indicates that the meeting concerned the relationship between Associated and its employees and had nothing to do with Rainbow shops.

<sup>13</sup> Not otherwise identified but probably Emily Wroblewski.

<sup>14</sup> Lachtara's testimony to the contrary is not credited. Her testimony, all 60 pages of it, is riddled with inconsistencies as to dates, the contents of meetings and alleged statements made to her directly. I find her testimony totally unreliable and do not generally rely upon it unless supported by the testimony of others or by the probabilities of a given situation.

Sullivan testified that she was never interviewed for employment by Fink or any one else from Rainbow and never worked for Respondent. Sullivan also testified that she worked at the State Street store the days that Fink was taking applications and took several messages for Fink and brought them to her so that Fink knew that she was an employee of Associated. When she returned her application to Fink, there was no discussion.

Fink testified that the 2 days that she was taking applications there were long lines of applicants. Sullivan confirmed this. According to Fink, as she obtained each completed application, she asked each applicant a few questions such as where they lived in proximity to the store which they were inquiring about.

Ethel Weatherspoon, Sullivan's sister also applied for work with Rainbow on August 1. She obtained an application from Fink but did not inform Fink of her relationship to Sullivan. She completed the application and returned it to Fink. At this time, according to Weatherspoon, Fink asked her if she ever belonged to a union and she replied in the negative, adding that she preferred not to; that she had had some bad dealings with unions. Fink denied asking Weatherspoon or any other applicant questions about unions. I credit Fink's denial. Weatherspoon was hired by Fink the same day she applied, as a part-time sales associate, later to be groomed as an assistant manager.

With regard to Sullivan's application, Fink testified that a cashier had been calling Fink to answer the telephone and at one point Fink asked her if she wished to apply. Fink implied that the cashier, whose name Fink could not recall, may have been Sullivan. The cashier then asked Fink whether she would be there all day, and if she could file an application later. Fink told her that she could, and the cashier came over later and obtained an application. Fink could not recall whether or not the cashier ever turned in a completed application. She did not, nor did anyone, shed any light on why Sullivan was not hired.

Counsel for General Counsel would have me compare the disparate treatment of Sullivan's and Weatherspoon's applications and conclude that it reflects antiunion animus since at the time of application Fink was aware that Sullivan was a union member and Weatherspoon was not. I find that the comparison does not, of itself, evidence antiunion animus but the matter will be weighed as part of the total picture.

Evelyn Sullivan testified that on August 6, the last day that Associated was in business at the State Street store, she attended a meeting, called by Alpert. Present were all of the other employees, managers, and assistant managers. According to Sullivan, Alpert addressed those present, telling them that it was their last day, that the store was closing. He stated that he was staying on as manager and that Downs was also staying on as assistant manager but that from his understanding, Rainbow Shops was not hiring union members. Downs also spoke after Alpert and, according to Sullivan, said that Rainbow Shops definitely was not accepting union members.

Although Sullivan testified that everyone attended this meeting, no one was called to support her testimony. Lachtara, General Counsel's most pronoun witness, gave testimony concerning August 6, her last day working for Associated but did not mention any meeting. Downs took the stand to refute Sullivan's testimony. She stated that there was no meeting on August 6 and she never made the statement

attributed to her by Sullivan at any meeting that she did attend. I find that there was no meeting on August 6 and credit Downs over Sullivan.

Clara Qualls, a rank-and-file employee of Associated, and union member for 10 years, testified that she was laid off from her job at the 6330 S. Halsted Street store on April 23.<sup>15</sup> She was laid off, at that time, by Dora Baughn who had taken over as store manager for the purpose of closing the store.

According to Qualls, in July she visited the store at 635 E. 63d Street where she engaged Dora Baughn in conversation. Baughn told Qualls at this time that "they<sup>16</sup> weren't hiring any union employees."

Baughn testified that in July she was working at the Halsted Street store for Associated preparing that store for closing and did not work at the 63d Street store until early August. In August she worked for 2 to 3 days, possibly a week, for Rainbow helping to get the store ready for opening. It was not until after she finished working at 63d Street that she next went to 6330 where she was appointed store manager. At any rate, Baughn specifically denied telling Qualls that Rainbow was not hiring any union employees.

I find that if the alleged conversation occurred in July, Baughn was still working for Associated and was merely telling Qualls that the closing down of stores would be accomplished by the replacement of rank-and-file employees by district managers and that union (unit) employees would not be hired or retained for this purpose. If Qualls was wrong as to the date of the alleged conversation, and it took place in early August, the only time that Baughn was at the 63d Street store, then I find that although she was a Rainbow employee, she had not yet been appointed store manager at 6330 S. Halsted. In either case, Baughn was not an agent of Rainbow at the time of the alleged statement and I find no evidence of a violation or of animus on the part of Respondent in connection therewith.

Qualls also testified that around the last of August, later corrected to the last of September, she visited the store at 6330 Halsted and again talked with Dora Baughn who was by then manager of the store for Rainbow. She asked Baughn for an application. Baughn, according to Qualls, told her that they weren't hiring any union employees.

With regard to this incident, Baughn denied that there was any August or September meeting with Qualls but testified that Qualls visited her store in March or April 1989 and asked her if she would furnish a reference on her behalf because she had applied for a position at a hotel. Baughn agreed to do so. Baughn denied that Qualls either asked for an application or inquired about openings on this occasion. She also denied ever telling Qualls that Rainbow was not hiring union employees or people who had been with the Union at Associated.

I find that Qualls did, in fact, visit Baughn's store in August or September, asked for an application and was told, as she credibly testified, that they were not hiring union employees. It is quite clear that if Baughn made the statement attributed to her in the complaint dated December 30, it had to have been made before the issuance of complaint, prob-

<sup>15</sup> Qualls had also worked at other Associated stores on a part-time basis but no longer did so at the time of her layoff at 6330 S. Halsted.

<sup>16</sup> General Counsel substituted the word "Rainbow" for "they" in his next question and the witness followed General Counsel's lead.

ably at the August/September meeting described by Qualls, not the following March or April.

I find that by Baughn's statement to Qualls that Rainbow was not hiring any union employees, Respondent violated Section 8(a)(1) of the Act.<sup>17</sup> I find, further, that this statement effectively dissuaded Qualls from pursuing her intent to seek employment with Respondent in violation of Section 8(a)(3).<sup>18</sup>

Marcela Dargin was an employee of Associated from October 1978 until December 1987. She was employed as a cashier and bookkeeper at the E. 63d Street store until her layoff. In March 1988 she was hired to work at Associated's Just Kids store in Evergreen Plaza as assistant manager and cashier. In July 1988 she was laid off at that store because Associated was going out of business. There were only evening hours available and Dargin was unable or unwilling to work evenings. Her last day was July 16. She had been a member of the Union for 10 years.

Dargin testified that in late August or early September, after it had been taken over by Rainbow, she visited the 63d Street store and talked to Dora Baughn, who was the store manager at the time. Her visit was not for the purpose of applying for a job. According to Dargin, Baughn told her that Rainbow had hired all new girls, that they weren't hiring any union members and that they were only hiring managers. She advised Dargin that the girls that they had hired were making minimum wage and working less than 20 hours.

As noted earlier, Dora Baughn was not, during August or September or any relevant period, the store manager at the 63d Street store but only worked there in early August for a few days helping to open the store. Rather, Dora Baughn became the store manager at the 6330 Halsted Street store after she helped set up the 63d Street store. Since Dora Baughn denied making the statement attributed to her and, in any case, was clearly not an agent of Respondent at the 63d Street store when the alleged offending statement was made, I shall recommend dismissal of the allegation.

As an aside, personnel papers in the record indicate that Belle Baughn, Dora's sister-in-law, was the store manager at the 63d Street store during the critical period. Belle is not mentioned in the complaint as involved in any of the alleged 8(a)(1) incidents and none of General Counsel's witnesses were examined in connection with Belle Baughn's possibly being involved in the incidents at the 63d Street store alleged to be violative of the Act.

Evelyn Sullivan, an employee of Associated for a year and a half, was employed at the State Street store as a rank-and-file, cashier-saleslady-bookkeeper until August 6, 1988, at which time she was terminated because the store had gone out of business, as of that date. Sullivan had been a member of the Union for most of the period of time she worked for Associated.

Sullivan testified that after Rainbow had taken over the Associated stores, sometime in September, she went to the store at 6330 Halsted Street to seek employment because she had heard that "some of the girls" were quitting. There, she spoke to Dora Baughn, the store manager, whom she had never met before, and asked her if she could fill out an application for employment. According to Sullivan, Baughn

told her that applications were not being given out at the store, that she would have to go to the State Street store. When Sullivan explained that she had worked at the State Street store and had already put in an application there, Baughn told Sullivan that the York (Associated) girls were not being hired because Rainbow was not taking union members. She stated that Rainbow was afraid of the union members coming in and forming another union. After her discussion with Baughn, Sullivan did not contact the State Street store either by telephone or in person.

Concerning this incident, Dora Baughn testified that she does not know Sullivan and that she could not recall anyone coming into the store at 6330 S. Halsted Street in or around September and identifying herself as a former York (Associated) employee. She further testified that she never told anybody who may have come into the store that Rainbow Shops did not want a union or that it was afraid of employees forming a union or that former York employees were not going to be hired by Rainbow.

With regard to this incident, I find that Baughn did, in fact, make the statement attributed to her by Sullivan. I further find that as store manager with supervisory authority, her statement is properly attributable to Respondent and is a violation of Section 8(a)(1) of the Act.<sup>19</sup> Finally, I find that Respondent's failure to hire Sullivan was violative of Section 8(a)(3).<sup>20</sup>

Ollie Sims, an employee of Associated since 1964, had worked at the 6330 S. Halsted Street store as a cashier, until June 4, 1988, when she was laid off. According to Sims, she visited her previous place of employment about a week after it had reopened as a Rainbow Shop in August and spoke with Dora Baughn, the store manager, one of several store managers for whom Sims had worked as an employee of Associated. Sims testified that this visit occurred either in mid-August or September and was casual and initially not for the purpose of seeking employment. She did not, therefore, ask for an application at first.

According to Sims, after some small talk, however, she suggested to Baughn that she could come back to work at the store. To this suggestion, Baughn replied, "They are not going to hire you," adding, "If you were a [union] member, they won't hire you."

With regard to Sims' visit to the 6330 S. Halsted Street store, Dora Baughn testified that Sims stopped in at the store after it was reopened as a Rainbow store, said hello to the window trimmer and to her, and then left. Baughn denied that Sims requested that she be permitted to come back to work for Rainbow at this time. She also denied telling Sims that Rainbow was not hiring union members or people who had been in the Union at York [Associated].

In this matter, I credit the testimony of Sims over that of Baughn. Consequently, I find violations of Section 8(a)(1) and (3).<sup>21</sup>

Geneva Walker was an employee of Associated from August 1977 through December 5, 1987. She worked at the 6330 S. Halsted Street store and the store located at 78th & Halsted. She was employed as a cashier and salesclerk at both locations and, as a rank-and-file employee, was a mem-

<sup>17</sup> *American Press*, 280 NLRB 937 (1986).

<sup>18</sup> *Love's Barbecue Restaurant*, 245 NLRB 78 (1979).

<sup>19</sup> *American Press*, supra.

<sup>20</sup> *Love's Barbecue*, supra.

<sup>21</sup> *Love's Barbecue*, supra.

ber of the Union. Walker was laid off at 6330 S. Halsted after being told that the store was going to close.

Walker testified that after the store at 3434 Halsted reopened as a Rainbow store, she visited that store in the first part of September and spoke to the store manager, Renee Carrillo. She asked Carrillo if she was hiring. Carrillo replied that she was not hiring at the time but that Walker could take an application. She did so but did not fill it out at the time.

As a consequence, the Region undertook an investigation and as part thereof, it sent out questionnaires, one of which was received by Walker on December 3. According to Walker, it was the receipt of the questionnaire which prompted her to return to Carrillo's store to see what was going on.

On December 5, Walker returned to the store and again spoke to Carrillo. According to Walker, Carrillo told her that "they don't hire no union members there. Anybody that had been at Associated Retail, they weren't hiring. Carrillo and Walker then discussed the various members of Associated's management who had been hired by Rainbow and where they were working at the time. Carrillo asked Walker if she knew Dora Baughn. Walker told Carrillo that she knew Dora Baughn personally. Carrillo then suggested that Walker "get the lowdown" from her. After leaving her application with Carrillo, Walker left the store.

Upon arriving at her home, Walker immediately called Dora Baughn at the store at 6330 S. Halsted. Baughn suggested that Walker call her at her home that evening, and Walker did so. According to Walker she asked Baughn why she did not call and hire some of Associated's ex-employees since she knew them so well and so personally. Baughn responded:

They don't want none of the union members. That is why none of the jobs is not offered to us. . . . And she said they didn't want no union. And nobody that is affiliated with Associated Retail.

With regard to the Carrillo/Walker conversation, Carrillo did not testify. With regard to the Baughn/Walker telephone conversation, Baughn testified that she did, in fact, have a telephone conversation with Walker on December 5. She testified further that she knew Walker from the days when she was a district manager for Associated, and that Walker called her rather than the other way around. According to Baughn, Walker told her that the reason she was calling was that she had received a letter from the Union [probably the questionnaire from the Board] and wanted to know if Baughn knew anything about it. Baughn replied in the negative. Walker then asked Baughn if she knew who the head of the company was. Although Walker had not asked for a job, Baughn replied that Walker should call Celender if she were applying for a job because she understood that Respondent was in need of managers and assistant managers at the time. Baughn specifically denied telling Walker that Rainbow Shops did not want union members or telling her that Rainbow was not hiring people that had been in the union at York.

Between the testimony of Baughn and Walker, I credit that of Walker and find that by Baughn's statements Respondent violated Section 8(a)(1) of the Act.<sup>22</sup> Moreover, I find that Baughn made it clear to Walker that it was futile for any ex-employee of Associated who had been a union member to

apply for employment with Rainbow and by so doing, Respondent violated Section 8(a)(3).<sup>23</sup> Similarly, I credit Walker's description of her conversation with Carrillo and find Respondent in violation of Section 8(a)(1) and (3) in connection therewith.

On December 6, the day after her discussion with Dora Baughn, Walker visited the Rainbow store located at 47th and Ashland. There she spoke with the store manager, Dorothy Ringo and asked her if Rainbow was doing any hiring. Ringo replied in the negative, at the same time identifying Walker by name and explaining that she remembered her from working together on inventory at the store at 63d and Halsted, when it was an Associated store. She advised Walker to see Calender at the State Street store about employment, but cautioned, "but they don't want no union. That is why they ain't hiring any of these York people."

Dorothy Ringo testified that Geneva Walker visited the store where she was manager on December 6. She said that she could not remember whether or not Walker asked her if she was hiring, but denied telling her that Rainbow Shops did not want a union.

With regard to the December 6 conversation between Walker and Ringo, I credit Walker's description of what was said. I find that Walker inquired about a job and that Ringo made the statement attributed to her I find that Respondent, through Ringo, violated Section 8(a)(1) and (3).<sup>24</sup>

Marilyn Campbell was an employee of Associated from May 31, 1977, until July 19, 1988, at which time she left her employment at the store located at 4049 W. Madison because the store was in the process of closing. Campbell testified that in October she visited the store where she used to work, by this time a Rainbow store, and talked with Vera Gardner, the store manager.<sup>25</sup> According to Campbell, Gardner told her that she liked working there, then described how things were different than they had been when she had worked for Associated. When Campbell asked Gardner about a job with Rainbow, Gardner replied that Rainbow was not hiring any of the old Associated cashiers because "they didn't want to hire any of the union workers." She added that Rainbow was only hiring parttimers because they were only paying minimum wages. Campbell decided not to file an application because Gardner had said that Rainbow was not hiring any of the old cashiers, any of the union workers.

Gardner did not testify and the statement attributed to her by Campbell remains undenied. I credit Campbell's testimony that the statement was made and find that it was in violation of Section 8(a)(1).<sup>26</sup> I also find that the statement made by Gardner had the effect of convincing Campbell not to bother filing an application for employment with Respondent because it would be futile to do so. Consequently, I find Respondent in violation of Section 8(a)(3) of the Act.<sup>27</sup>

The fact that four different store managers told General Counsel's witnesses that Respondent was not hiring ex-employees of Associated because of their union affiliation con-

<sup>23</sup> *Love's Barbecue*, supra.

<sup>24</sup> *Love's Barbecue*, supra.

<sup>25</sup> The complaint alleges that Gardner was the store manager and Respondent's agent. The answer denies this. Campbell testified that she believed that Gardner was an assistant store manager at the time. The records indicate that Gardner was the sole salaried person at the store. I conclude that she was the store manager.

<sup>26</sup> *American Press*, supra.

<sup>27</sup> *Love's Barbecue*, supra.

<sup>22</sup> *American Press*, supra.

vinces me that the statements were more than were reflections of their opinions and, on the contrary, reveals the antiunion bias underlying the refusal of Respondent to hire any of Associated's rank-and-file union employees. For this reason, I find that any ex-employee of Associated that had been a union member, who actually filed an application for employment with Rainbow, and who was denied employment, must be considered a discriminatee. This includes those employees who filed applications in 1988 and who were belatedly not hired until 1989, after the issuance of the complaint.

### III. THE 8(A)(5) ALLEGATION

General Counsel argues the application of *Love's Barbecue*<sup>28</sup> with a consequential finding of an 8(a)(5) violation. The record reveals, however, that 11 of the 13 stores taken over by Rainbow from Associated were closed and their union employees terminated by Associated before Rainbow appeared on the scene. These employees dispersed long before Rainbow began interviewing perspective employees on August 1 and 2 and probably never even heard of Rainbow much less gave any consideration as to whether or not it would be futile to apply for employment with Respondent. When General Counsel's witnesses were made aware during the period August through December 1988 that it was futile for them to apply for work, they were the only ones so advised, at least insofar as the record reveals. There is nothing to indicate that the other employees, terminated the previous June, July or earlier, were aware of the incidents which occurred weeks or even months later or were dissuaded from seeking employment with Rainbow because of them. I therefore recommend dismissal of the 8(a)(5) allegations.<sup>29</sup>

### CONCLUSIONS OF LAW

1. The Respondent, Rainbow Shops, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by telling applicants for employment that it was not hiring union members.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discouraging the filing of job applications and failing to consider for employment and refusing to employ applicants for employment because they had been employed by Associated Retail Stores, Inc. and had been represented by the Union for purposes of collective bargaining. The following applicants suffered discrimination as a result of Respondent's 8(a)(1) and (3) violations:

Witness applicants:

Evelyn Sullivan  
Clara Qualls  
Ollie Simms  
Geneva Walker  
Marilyn Campbell

Applicants for part-time work:<sup>30</sup>

Caroline Caira  
Dorothy Campbell  
Betty Mack  
Betty Henderson  
Lillian Williamson

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent's hiring practices have discriminated against applicants who had been employed by Associated Retail Stores, Inc. and who had been represented by the Union in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it offer all such individuals who would have been hired, employment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, in substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions.<sup>31</sup> I shall also recommend that Respondent make whole, for any losses they may have suffered, all individuals it would have hired but for its unlawful discrimination against them, backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).

On the basis of these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>32</sup>

### ORDER

The Respondent, Rainbow Shops, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling applicants for employment that they will not hire union members.

(b) Discouraging the filing of job applications by applicants and failing to consider for employment and refusing to employ such applicants for employment because they have been employed by Associated Retail Stores, Inc., and have been represented by United Food and Commercial Workers Union Local 1550, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC or any other labor organization.

<sup>30</sup> Applicants for full-time work only would not have accepted part-time work even if offered and are therefore not listed as discriminatees.

<sup>31</sup> The remedy does not extend to former employees of Associated who had not applied for employment.

<sup>32</sup> If no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

<sup>28</sup> *Love's Barbecue Restaurant*, supra.

<sup>29</sup> *Kessel Food Markets*, 287 NLRB 426 (1987); *R & L Cartage & Sons*, 292 NLRB 530 (1989).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to all individuals who would have been hired, employment in the positions for which they would have been hired, but for Respondent's unlawful discrimination or, if those positions no longer exist, in substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions.

(b) Make whole, in the manner set forth in the section above entitled "The Remedy," those individuals the Respondent would have hired, but for its unlawful discrimination, for any losses they may have suffered by reason of the Respondent's failure to hire them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Sign and post at its stores in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found

<sup>34</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice.

To act together for other mutual aid or protection.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage the filing of job applications by applicants, fail to consider for employment or refuse to employ applicants for employment because they have been employed by Associated Retail Stores, Inc. and have been represented by United Food and Commercial Workers Union Local 1550, chartered by the United Food and Commercial Workers International Union, AFL-CIO, CLC or any other labor organization.

WE WILL NOT tell applicants for employment that we are not hiring union members.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to all individuals who would have been hired employment in the positions for which they would have been hired but for our unlawful discrimination or, if such jobs no longer exist, in substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions. WE WILL make whole with interest all individuals we would have hired but for our unlawful discrimination for any loss they may have suffered by reason of our failure to hire them.

RAINBOW SHOPS, INC.